

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OLEWASAMI BROWN,
Plaintiff,
v.
CITY OF OAKLAND, et al.
Defendants.

NO. C03-1141 TEH

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

This matter came before the Court on June 12, 2006 on Defendants' Motion For Summary Judgment. This case arises out of the stop and arrest of Plaintiff Olewasami Brown ("Brown"). Brown alleges that he was unlawfully stopped by California Highway Patrol and Oakland Police Department officers on the basis of a falsified warrant, and then was the victim of excessive force by Oakland Police Department officers. The four defendants remaining in the case, John Gutierrez, Randall Wingate, T.F. Aberouette, and Eric Richolt contend they are entitled to summary judgment because: 1) they are entitled to qualified immunity on Plaintiff's claim that the warrant was procured with false statements, and, even assuming the search warrant was invalid, the stop and arrest were valid on alternate grounds; and 2) that they are entitled to summary judgment on Plaintiff's excessive force claims, either because his injuries were *de minimis*, he has not raised a triable issue of fact, or the officers are entitled to qualified immunity. For the reasons set out below, the motion is GRANTED as to Brown's claims relating to the validity of the warrant, the stop, and the arrest; GRANTED as to Brown's claim of excessive force relating to Defendant Gutierrez's hold on Brown's jaw; GRANTED as to any claim against Defendant Aberouette relating to

1 the claim of excessive force in the Oakland Federal Building; and DENIED as to that claim
2 of excessive force as to Defendants Gutierrez, Wingate, and Richolt.

3

4 **BACKGROUND**

5 This case stems from the stop and arrest of Olewasami Brown on March 16, 2001. In
6 February, 2001, Oakland police officer and Defendant John Gutierrez received a tip from a
7 confidential informant that Brown was dealing narcotics. The Oakland Police Department
8 (“OPD”) began an investigation of Brown.

9 Brown admits he was on probation at the time of the investigation. He was subject to
10 a search clause as a condition of his probation which required him to submit to search, with
11 or without a warrant, by any law enforcement officer, of his person, vehicle, residence, or
12 other property under his control.¹ Nonetheless, on March 6, 2001, Gutierrez applied for a
13 search warrant. In his supporting affidavit, Gutierrez said his investigation showed Brown
14 was dealing narcotics from three locations in Oakland and Vallejo. Gutierrez obtained
15 search warrants that allowed officers to search Brown, his vehicles, and two of the properties
16 for cocaine and related items. Gutierrez and OPD Sergeant Brock decided to serve the
17 warrants by having the California Highway Patrol (“CHP”) stop Brown’s vehicle pursuant to
18 the warrants and search the residences while he was being detained.

19 On March 16, 2001, CHP officers (along with a convoy of OPD officers) followed
20 Brown on Highway 80 in order to conduct the stop. Officers testified that they observed
21 Brown speeding and making frequent unsafe lane changes, possibly in order to evade them.
22 See, e.g., Deposition of Frank Romano, May 18, 2005, at 16:16-17:20. They pulled Brown
23 over, and the OPD officers arrived on the scene.

24

25 ¹ The Defendants’ unopposed request for judicial notice pursuant to Fed. R. Evid. 201
26 of two documents from the Alameda Superior Court Criminal Division File No. 132250A,
27 *People of the State of California v. Olewasami Brown*, “Minute Order re: Probation,” dated
March 25, 1998, and the Reporter’s Transcript of Proceedings dated March 25, 1998, is
hereby GRANTED.

28

1 CHP officer Frank Romano testified that he approached the driver's side and observed
2 Brown reaching into the middle console of the Tahoe SUV. Romano removed Brown from
3 the vehicle.

4 Another CHP officer searched the Tahoe and found a .45 caliber pistol in the center
5 console. Defendant Gutierrez arrested Brown for violations of Cal. Penal Code §§ 12021(a)
6 (ex-felon in possession), 12025(a) (concealed firearm), 12031(a) (carrying a loaded firearm
7 in public), and 1203.2 (revocation of probation on arrest). .

8 Sgt. Brock attempted to take a photograph of Brown. Gutierrez told Brown several
9 times to stay still, and Brown refused. Brown testified, "he try to tell me lift my head up. I
10 didn't want to lift my head up, so he grabbed my neck and pulled it up himself." Deposition
11 of Olewasami Brown, February 27, 2006 ("Brown Depo."), at 165:22-23. Brown says he
12 was "choking," *id.* 166:12-13, and that he could "breathe a little bit." *Id.* at 167:12-20.
13 Gutierrez admits he held "under [Brown's] chin and the back of his shirt." Deposition of
14 John Gutierrez, June 2, 2005 ("Gutierrez Depo.") at 177:22-23. Brock took the photo.

15 Brown and Tucker were taken to the Oakland Federal Building. In the meantime,
16 officers searched the three properties they suspected Brown of frequenting, pursuant to both
17 the warrants and the probation search authority, and found firearms, ammunition, cocaine
18 base, and other incriminating items. Brown was charged with multiple counts of possession
19 of controlled substances, weapons violations, and a probation violation.

20 In the early evening, Gutierrez and other officers returned to the Federal Building.
21 What happened next was disputed. Brown claims that "Defendants Gutierrez, Wingate, and
22 Richolt used excessive force against Brown when Gutierrez held Plaintiff down while
23 Wingate and Richolt struck Brown." Opp. at 2:19-20. At his deposition, Brown said that "a
24 bunch" of officers rushed into the holding tank, Gutierrez held him down, and one officer hit
25 him with his right fist on the left cheek. Brown Depo. at 219-222. He claims he suffered
26 chipped teeth and one of his teeth cracked and later fell out, although he never sought dental
27 treatment. *Id.* at 230-31.

1 Defendants deny that anyone struck Brown. Defendant and OPD Officer Wingate
2 testified that at one point, he escorted Brown to a holding cell. When he removed Brown's
3 handcuffs, Brown – who had been yelling obscenities -- turned and took an "aggressive
4 stance." Declaration of Randall Wingate In Support of Defendants' Motion for Summary
5 Judgment, ¶ 3. Wingate pushed him in the chest using his right hand and told him to "sit
6 down." *Id.* Brown sat down but continued to yell. Gutierrez and officer Rodriguez came to
7 see what the noise was but just saw Brown sitting on a bench, yelling loudly. In his
8 deposition, Gutierrez said he believed that Officer Richolt "had to pull... Brown off of
9 Officer Wingate." Gutierrez Depo. at 177:1-2, but Richolt denies he had any interaction with
10 Brown that evening. Declaration of Eric Richolt In Support of Defendants' Motion for
11 Summary Judgment, ¶ 3. Defendant Aberouette was not at the scene.

12 Brown was held at Santa Rita from March 20, 2001 to March 15, 2002, when the
13 criminal case against him was dismissed "in the interests of justice" and he was released.
14

15 **LEGAL STANDARD**

16 Summary judgment is appropriate when there is no genuine dispute as to material
17 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
18 Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is
19 sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The
20 court may not weigh the evidence and must view the evidence in the light most favorable to
21 the nonmoving party. *Id.* at 255.

22 A party seeking summary judgment bears the initial burden of informing the court of
23 the basis for its motion, and of identifying those portions of the pleadings and discovery
24 responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at
25 trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than
26 for the moving party. *Id.* at 322-23. However, on an issue for which its opponent will have
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1 the burden of proof at trial, the moving party can prevail merely by “pointing out to the
2 District Court . . . that there is an absence of evidence to support the nonmoving party’s
3 case.” *Id.* at 325. If the moving party meets its initial burden, the opposing party must then
4 “set forth specific facts showing that there is a genuine issue for trial” to defeat the motion.
5 Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 250.

6

7 **DISCUSSION**

8 **I. Constitutional Challenge to the Search Warrant**

9 Brown claims his Fourth Amendment rights were violated because Gutierrez procured
10 the search warrants by making false and misleading statements in his affidavit. Brown
11 charges that numerous statements in the warrant are false: for example, that he never resided
12 at one of the houses involved, that he never had a key to that house, that “[m]any events
13 described in the warrants by Gutierrez never took place with Brown or may have taken place
14 but involved one of Brown’s close relatives,” Plaintiff’s Points and Authorities in Opposition
15 to Motion for Summary Judgment (“Opposition”) at 4:3-4, and that he never sold or gave
16 cocaine base to anyone. Brown asserts that the real reason he was stopped was that he was a
17 murder suspect, and that OPD Officer and Defendant Felix Aberouette had a grudge against
18 him and was harassing him. Without the warrant, he argues, the stop and arrest were
19 unlawful.

20 Defendants contend they are entitled to qualified immunity for this § 1983 claim.
21 Under the doctrine of qualified immunity, even if a constitutional violation occurred,
22 government officials are immune from liability if their conduct “does not violate clearly
23 established statutory or constitutional rights of which a reasonable person would have
24 known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

25 In *Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995), the Ninth Circuit set out the showing
26 plaintiff must make to survive a motion for summary judgment in cases where, as here, the
27 plaintiff claims his Fourth Amendment rights were violated by use of a falsely procured
28 warrant and the defense claims qualified immunity. First, the plaintiff must make a

1 “substantial showing” that the officer “submitted an affidavit that contained statements he
2 knew to be false or would have known were false had he not recklessly disregarded the
3 truth,” *Hervey*, 65 F.3d at 788, quoting *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir.
4 1991). Second, the plaintiff must show that “without the dishonestly included or omitted
5 information, the magistrate would not have issued the warrant” – that is, that “the remaining
6 information in the affidavit is insufficient to establish probable cause.” *Id.* at 789. This is
7 the same showing a plaintiff would be required to make to be entitled to an evidentiary
8 hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). *Id.*

9 The plaintiff’s allegations of falsity “cannot be merely conclusory and must be
10 accompanied by a detailed offer of proof.” *United States v. Chesher*, 678 F.2d 1353, 1360
11 (9th Cir. 1982), citing *Franks*, 438 U.S. at 171. At least one court has found, in the *Franks*
12 context, that a defendant’s own declaration that the statements in the affidavit are false is
13 insufficient to make such a showing: in *United States v. Valencia*, 24 F.3d 1106, 1109 (9th
14 Cir. 1994), the Ninth Circuit simply stated that defendant’s declaration denying the officer’s
15 version of events in the affidavit (asserting, for example, that he had never driven by a
16 certain address, although the officer stated he saw the defendant driving there) “is not a
17 substantial showing of intentionally or recklessly made false statements.”

18 Plaintiff has made neither the substantial showing of knowing falsity or recklessness
19 nor the showing of materiality required to survive summary judgment on any of the
20 challenged statements in the affidavit.

21 Some of the allegedly false statements simply are not actually contained in the
22 affidavit. Gutierrez did not state that Brown lived at 1620 Chestnut, or owned more than one
23 car; he simply reported what the confidential informant had said. See Declaration of Gregory
24 Fox in Support of Defendants’ Motion for Summary Judgment (“Fox Declaration”), Exh. B,
25 Affidavit for Search Warrant at 3-6.

26 As to the other statements, Brown has not made the “substantial showing” required.
27 To support his argument that Gutierrez falsely or recklessly claimed he was dealing cocaine,
28 Brown cites to the police report of the searches and arrests – which shows Brown had little

1 cash when he was arrested (approximately \$400) and that no drugs were found in the Vallejo
2 search cite. He also relies on his own interrogatory response stating that he never gave or
3 sold anyone cocaine, and the fact that no one took pictures of the “controlled buy.” Brown’s
4 own self-serving statement, the fact that he had cash, and the fact that he had guns rather than
5 drugs in his home do not prove Gutierrez’s statements were false.

6 Brown also seems to allege that Gutierrez falsely or recklessly claimed he was
7 observing Brown, when he was in fact observing his relative who resembles him, Jabrail
8 Armstrong. But Brown offers no evidence apart from his own interrogatory response to
9 support the claim of resemblance (such as photos). Even if Armstrong’s fingerprints were
10 found on items recovered during the search, that evidence would be insufficient to show the
11 officers were observing Armstrong rather than Brown on the numerous occasions set out in
12 the affidavit.

13 Brown contends Gutierrez falsely stated he saw Brown open the front door to 1620
14 Chestnut with a key. But he has offered no evidence, other than his own denial, to show this
15 statement is false. Similarly, Brown alleges that Gutierrez’s claims that he made surveillance
16 conscious driving movements or sold drugs to a confidential informant in a controlled buy
17 were false, but offers no evidence other than his own flat denials to show falsity.

18 Brown appears to claim that Gutierrez omitted from the affidavit any mention that
19 Brown was a suspect in a murder investigation. Opposition at 4:19-22. Even assuming for
20 the sake of argument that Brown was a murder suspect, and that Gutierrez omitted that fact,
21 Brown makes no argument or showing that the omission was “material” – that had the
22 information been included, the warrant would not have issued. *See Liston*, 120 F.3d at 973-
23 74.

24 In sum, plaintiff’s self-serving denials of wrongdoing and unsupported statements do
25 not constitute the substantial showing of falsehood or reckless disregard for the truth required
26 to survive summary judgment. *Hervey*, 65 F.3d at 788. Defendants are entitled to qualified
27 immunity.

28 Moreover, even if the warrant had been falsely procured, there were at least two other

1 lawful reasons for stopping Brown. First, Brown's speeding and unsafe lane changes
2 justified the stop. A police officer's observation of erratic driving and speeding creates
3 probable cause to believe a defendant is violating a traffic safety regulation. *United States v.*
4 *Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985), *citing Delaware v. Prouse*, 440 U.S. 648, 661
5 (1979). Two officers observed Brown speeding and making unsafe lane changes. Gutierrez
6 Depo. at 112-113, Romano Depo. at 15-17. Second, the stop was valid because of the search
7 clause that was a condition of Brown's probation. The search clause allowed for warrantless
8 search of Brown's person, vehicle, and other property under his control. The Supreme Court
9 has held that a warrantless search of a probationer, supported by reasonable suspicion and
10 authorized by a condition of his probation, is reasonable within the meaning of the Fourth
11 Amendment. *United States v. Knights*, 534 U.S. 112, 121-22 (2001). The "actual
12 motivations" of individual officers are irrelevant; the search is valid, whether for probation or
13 investigation purposes, if it is objectively reasonable under the totality of the circumstances.
14 *Id.* There was "reasonable suspicion" to believe Brown was engaged in criminal activity, so
15 the search was valid.

16 Finally, the arrest was unquestionably valid. Brown admits he was an ex-felon, and
17 that he placed a .45 caliber pistol in the center console of his Tahoe. Brown Depo. at 132-
18 136. Although the parties dispute whether the gun was loaded, it was unlawful for Brown to
19 possess a firearm or carry a concealed firearm loaded or unloaded. *See* Cal. Penal Code §§
20 12021(a) (ex-felon in possession); 12025(a) (concealed firearm); *People v. Harrison*, 1
21 Cal.App.3d 115, 122 (1969) (§ 12021 makes it unlawful for an ex-felon to carry a concealable
22 firearm, loaded or unloaded).

23 Defendants' motion is therefore GRANTED as to Brown's claims relating to the
24 validity of the warrant, the stop, and the arrest.

25

26 **II. Plaintiff's Excessive Force Claims**

27 Plaintiff makes two excessive force claims: first, that Defendant Gutierrez used
28 excessive force in holding his head up for a photograph and thereby choking him at the time

1 of his arrest; and second, that he was held down by Gutierrez and punched in the face by
2 another officer(s) while he was in the holding area at the Oakland Federal Building later the
3 same day.

4 Brown claims that Defendants' use of force violated both his right to be free from
5 unreasonable seizure and his due process right to be free from pretrial punishment. First
6 Amended Complaint, ¶ 6(c), (d). The Fourth Amendment "sets the applicable constitutional
7 limitations" for each type of claim. *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th
8 Cir. 2002). Courts use a standard of objective reasonableness to determine whether use of
9 force violates the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 397 (1994). The
10 "force which is applied must be balanced against the need for that force." *Deorle v.*
11 *Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001), *cert. denied*, 536 U.S. 958, *quoting Liston*
12 *v. County of Riverside*, 120 F.3d 965, 976 (1997). The court assesses the quantum of force
13 used by considering the nature and quality of the intrusion on the individual's interests,
14 whether the suspect poses a threat to the safety of officers or is resisting, and the type and
15 amount of force inflicted. *Gibson*, 290 F.3d at 1197; *Drummond v. City of Anaheim*, 343
16 F.3d 1052, 1056 (9th Cir. 2003).

17 To determine whether officers are entitled to qualified immunity for excessive force
18 claims, the court must consider, first, whether the facts -- resolving all disputes of credibility
19 and inferences in favor of the plaintiff -- demonstrate that plaintiff's constitutional rights were
20 violated, and second, if plaintiff's constitutional rights were violated, whether a reasonable
21 officer would recognize that his or her conduct violates those rights under the circumstances
22 and in light of the law that existed at the time. *Saucier v. Katz*, 533 U.S. 194, 201 (2001);
23 *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004).

24 **A. De Minimis Injury**

25 In their motion, Defendants argued that, credibility issues aside, the Court should find
26 there was no Fourth Amendment violation as a matter of law because Brown's injuries were
27 *de minimis*. In support of this proposition, they cite cases from other circuits which hold that,
28 for example, "a minimal amount of *force and injury* ... will not defeat an officer's qualified

1 immunity in an excessive force case.” *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir.
2 2000)(emphasis added). But the test for excessive force is one of objective reasonableness –
3 the “force which is applied must be balanced against the need for that force.” *Deorle*, 272
4 F.3d at 1279. The severity of the plaintiff’s injury does not factor in to that equation. It can,
5 however, be *evidence* of minimal use of force. *See, e.g., Arpin v. Santa Clara Valley*
6 *Transp. Agency*, 261 F.3d 912, 918 (9th Cir. 2001)(use of force justified where the amount of
7 force was not sufficient to create evidence of injury). At oral argument, Defendants
8 suggested that *de minimis* injury was, in fact, simply evidence that the force used was slight.
9 Accordingly, the Court will consider *de minimis* injury to determine whether the use of force
10 was reasonable *only insofar* as it is indicative of the amount of force that was applied.

11 **B. Choke/Jaw Hold**

12 Defendants argue that they are entitled to summary judgment on plaintiff’s claim that
13 Officer Gutierrez used excessive force against him when he held his jaw to photograph him.
14 They argue Brown’s statements about the “choke” hold have been so erratic and unbelievable
15 that he cannot raise a genuine issue of material fact for the jury. They also argue that
16 Gutierrez is entitled to qualified immunity on this claim.

17 Plaintiff’s sole argument in opposition to summary judgment on the choke hold is to
18 refer, without analysis, to the internal investigations documents reviewed *in camera* and
19 released in redacted form to the plaintiff by Order dated March 14, 2006 (Docket No. 76).
20 Defendants correctly argue that the court should not consider evidence of these “remedial”
21 measures under Fed. R. Evid. § 407. *See Maddox v. City of Los Angeles*, 792 F.2d 1408,
22 1417 (9th Cir. 1986)(city’s disciplinary proceeding on use of choke hold inadmissible as a
23 remedial measure in excessive force case). Moreover, the internal investigation is irrelevant:
24 whether Gutierrez’s acts did or did not violate OPD standards does not prove or disprove a
25 constitutional violation.

26 Given the facts of this case, the Court finds that even if there were triable issues of
27 fact as to whether Brown was subjected to excessive force while he was photographed,
28 Defendant Gutierrez is entitled to qualified immunity. It is undisputed that Gutierrez held

1 Brown's jaw with one hand. Brown Depo. at 165:24-25 ("grabbed my neck and pulled it up
 2 himself"), 166:14-17. Brown was swearing and resisting. He was held by the neck for 15-20
 3 seconds. *Id.* at 168:10-12. He was able to breathe. *Id.* at 167:15. He did not complain
 4 about the incident until a picture of it was disclosed in discovery.² The absence of evidence
 5 of injury shows that the force used was minimal.

6 As Defendants point out, arresting officers are entitled to use "some degree of
 7 physical coercion." *Graham*, 490 U.S. at 396. "Not every push or shove, even if it may
 8 later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."
 9 *Graham v. Connor*, 490 U.S. at 396. Here, Gutierrez held Brown's chin without choking
 10 him, and Brown did not complain of pain during the event. At oral argument, plaintiff
 11 admitted he had no authority to show that at the time of the incident, a reasonable officer
 12 would be on notice that such conduct would be unlawful.

13 Under the circumstances of this case, Gutierrez is entitled to qualified immunity.
 14 Accordingly, defendants' motion is GRANTED as to Brown's claim that the hold constituted
 15 excessive use of force.

16 C. The Punch In The Federal Building

17 Plaintiff also claims that once he was in a holding cell at the Oakland Federal
 18 Building, one or two officers punched him as Gutierrez held him down, causing him to lose a
 19 tooth. The officers claim that no one punched Brown, and that Officer Wingate merely
 20 pushed him onto a bench. Defendants make no claim of qualified immunity as to this
 21 incident.

22 ² Brown admits that after his arrest, he made no complaint about the choking injury
 23 either at the Oakland Jail or at Santa Rita County jail, and never sought medical treatment
 24 relating to the incident. Brown Depo. at 308, 313. In his first responses to interrogatories,
 25 Brown did not mention the choking incident when asked to state all facts supporting his
 26 excessive force claims and his interactions with Gutierrez on the day of his arrest. Plaintiff's
 27 Supplemental Responses to City of Oakland's First Set of Interrogatories Nos. 9, 11, dated
 28 October 25, 2004. After the Defendants provided Brown with the photograph of Gutierrez
 holding his neck in discovery, Fox Decl. Exh. G, however, Brown changed his claims. In
 response to Gutierrez's interrogatories, he said Gutierrez "grabbed Plaintiff by the face and
 chin, twisting Plaintiff's neck and face, while Plaintiff sat in the back of a law enforcement
 vehicle," (emphasis added), that his jaw and neck hurt, and that he felt humiliated, violated,
 and embarrassed by the incident. Fox Decl. Exh. J, Plaintiff's Amended Responses to John
 Gutierrez's Interrogatories, dated February 6, 2006, at: 4:15-17 and 5:3-4.

1 Brown's complaints were, as Defendants argue, inconsistent. Santa Rita medical
2 records indicate Brown complained about being hit on the left side of his head with a baton,
3 but didn't mention his teeth. Defendants observe that the booking photo taken approximately
4 9 hours after the alleged attack does not show any swelling on the left side of Brown's face.

5 Nonetheless, this presents a classic triable issue of fact. Brown says the punch
6 happened; the officers say it didn't. It is for the trier of fact to weigh the evidence and make
7 credibility determinations.

8 Defendants cite one Second Circuit case to argue that the court can grant summary
9 judgment where the plaintiff relies only on his own declaration. But in *Jeffreys v. New York*,
10 426 F.3d 549, 554 (2nd Cir. 2005), the plaintiff's story was spectacularly outlandish. After
11 plaintiff was caught robbing a school, an officer saw him jump from a third-story window to
12 escape arrest. Plaintiff told medical personnel, a police interviewer, and a corrections officer
13 he had jumped from the window. Nine months after the fact, he complained for the first time
14 that officers had beaten him unconscious and thrown him from the window. The Court of
15 Appeal found that it was one of the rare cases where "no reasonable person" could believe
16 the Plaintiff's testimony. Here, in contrast, the Defendants admit that there was some
17 physical interaction between Brown and at least one officer.

18 Moreover, losing a tooth is not *de minimis* injury. Although Brown did not offer
19 evidence of his injury other than his own testimony and some evidence that he complained of
20 pain, it is for the trier of fact to weigh the evidence and determine whether Brown's own
21 description of his injury suffices.

22 Accordingly, summary judgment is not appropriate on this claim as to Defendants
23 Gutierrez, Wingate, and Richolt. Brown has alleged no facts, much less triable issues of fact,
24 on this claim as to Defendant Aberouette. Defendants' motion is GRANTED as to
25 Defendant Aberouette and DENIED as to Defendants Gutierrez, Wingate, and Richolt.

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1 **CONCLUSION**

2 For the reasons discussed above, IT IS HEREBY ORDERED that:

3 Defendants' motion for summary judgment is GRANTED as to 1) Brown's claims
4 relating to the validity of the warrant, the stop, and the arrest; 2) Brown's claim that
5 Defendant Gutierrez's hold on his jaw constituted excessive force; and 3) Brown's claim of
6 excessive force against Defendant Aberoutte. The motion is DENIED as to Brown's
7 excessive force claim against Defendants Gutierrez, Wingate, and Richolt.

8 The parties are HEREBY ordered to file a joint status conference statement on or
9 before July 10, 2006, and are HEREBY ordered to appear at a status conference at 1:30 p.m.
10 on July 17, 2006, for the purpose of setting trial dates.

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12 **IT IS SO ORDERED.**

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14 Dated: June 27, 2006


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THELTON E. HENDERSON, JUDGE
16 UNITED STATES DISTRICT COURT

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